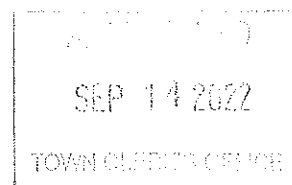


TOWN OF SOMERS
Conservation Commission
600 Main Street

REGULAR MEETING
WEDNESDAY, SEPTEMBER 7, 2022
7:00 PM TOWN HALL
MINUTES



I. CALL TO ORDER

Meeting called to order by Joan Formeister at 7:03pm. Commissioners in attendance were Daniel Fraro, Sydney Flowers, Drew Kukucka and alternate Lise Wood. Also in attendance were Recording Secretary Tara Comrie and Wetland Agent Joanna Shapiro.

Joan Formeister seated Lise Wood for Candace Aleks.

II. OLD BUSINESS

1. **Pending Claims and Litigation – Hangdog Lane, LLC v. Town of Somers Conservation Commission, Et Al.** Docket Number TTD-CV21-6022780S.

Town Attorney Carl Landolina was in attendance.

Agent Shapiro explained that the decision came back from the judge regarding the intervenor's appeal of the Commission's approval of Application 740 requesting a driveway extension in the upland review area. Agent Shapiro stated that the court ruled in favor of the Somers Conservation Commission on every item except for one due to a regulatory technicality. A collective statement needed to be made on the record to provide a reason for approval.

Attorney Landolina explained that the Somers Inland Wetlands and Watercourses Regulations 211-11(c), along with many others in CT based on the DEEP model regulations, specify that the commission must make a written finding on every public hearing decision made. This must include a written collective statement on record stating that all commissioners are in agreement with the finding.

Drew Kukucka asked if this rule applies to public hearings only.

Attorney Landolina stated that the written requirement portion only applies to public hearings, but that the rest of the requirement applies to all decisions. He suggested that the language in the town regulations can be altered to make a differentiation between the different methods of having a public hearing, finding of significant activity versus public petition.

Attorney Landolina also explained that the law states that all applications must include feasible and prudent alternatives but that case law shows that plans showing all of those alternatives do not need to be presented. Also, while applications deemed a significant activity cannot be approved without a finding that there is no feasible and prudent alternative with less impact to wetlands, that is not required for public hearings held only due to a petition from the public.

Attorney Landolina provided a draft written resolution: "Resolution Regarding Application Number 740 Roulrier Family Limited Partnership for permit to conduct regulated activities related to the extension of a driveway and drainage activities of 50 Hangdog Lane, Somers" for the commission to consider, that takes into account the complexity of the law in reaching their finding.

Agent Shapiro corrected a typographical error related to the spelling of the Soil Scientist's name to Zulick.

The Commission also discussed how this court ruling impacts all of their decisions going forward, and Attorney Landolina suggested using this resolution as a template, modifying as needed, until the Commission potentially revises their regulations to ease this requirement. Items 1, 2, and 4 in particular would be appropriate for most verbal statements for decisions not involving a public hearing.

Drew Kukucka read the written resolution into the record and moved: "Resolution Regarding Application Number 740 Roulrier Family Limited Partnership for permit to conduct regulated activities related to the extension of a driveway and drainage activities of 50 Hangdog Lane, Somers. I hereby move that application Number 740 be approved based upon the following:

1. The Commission finds that the Applicant has submitted all necessary application materials pursuant to Section 211-7 of the Wetlands Regulations, including but not limited to, Section 211-7(E)(5) "Alternatives considered and rejected".
2. Although the Commission did not find the proposed activities "significant" it held a public hearing pursuant to C.G.S. § 22a-42a(c)(1) and Section 211-19A of the Regulations.
3. By separate vote the Commission found that a petition filed by proposed intervenors pursuant to C.G.S. § 22a-19 did not establish "a reasonable likelihood of pollution or impairment" to any natural resource of the State of Connecticut over which it has jurisdiction.
4. The Commission finds that the criteria set forth in Section 211-10B have been met by the Applicant and there is substantial evidence in the record to support this finding.
5. The Commission also finds that the Applicant's soil scientist Rick Zulick and a soil scientist engaged by the abutter, George Logan, have agreed on the location of wetlands on the site. Furthermore Mr. Zulick has testified that the proposed activity will have no adverse impact on wetlands or watercourses and Mr. Logan did not issue any opinion on adverse impacts.
6. The Commission also finds that an alternative proposal for the location of the driveway made by abutter's engineer is not a feasible and prudent alternative, as Applicant's expert Jay Ussury, testified that the alternative proposal could cause increased runoff. The Commission finds Mr. Ussery's testimony credible."

Daniel Fraro seconded.

Joan Formeister, Drew Kukucka, and Dan Fraro voted in favor; Sydney Flowers and Lise Wood abstained. Motion carried.

2. **Discussion/Possible Decision #775: 56 Egypt Road (Four-Town Fair).** Fill in previously constructed mud bog within Upland Review Area. Union Agricultural Society of Somers, Ellington, East Windsor, Enfield.

Agent Shapiro stated that in 2016 the commission approved an application for mud bogs for the applicant, and one was constructed. Since then, a lawsuit compelled the applicant to discontinue use of the mud bog. They would like to fill it back in. The mud bog is in the upland review area. There is dense vegetation between the bog and the wetland.

George VanTasel, representing the applicant, stated that the mud bog is approximately 30 feet by 200 feet, and 24 feet deep. He said that they are motivated to fill it out of public safety concerns, for fear of an accident taking place. They are not changing the surrounding grading.

Drew Kukucka asked if there is silt fence installed at the site currently. Agent Shapiro stated that there is but that it may not be in great shape. Another option is to leave the dense vegetation in place until the area is stabilized. George VanTasel explained that there are also hay bales in addition to the silt fence, and that they plan to fill in the mud bog and seed it. Drew Kukucka asked if the silt fence has been or should be removed. Agent Shapiro stated that the silt fence should ultimately be removed once the site is stabilized.

Agent Shapiro asked the commission if they would require new silt fence and new hay bales. She stated that she could visit the site to check on the dense vegetation between the mud bog and the wetland prior to work beginning if they prefer.

Drew Kukucka made a motion to approve application 775, 56 Egypt Road. Fill in previously constructed mud bog within the Upland Review Area.

Daniel Fraro seconded.

The Commission discussed the fee waiver formally requested and explained by the non-profit applicant, and reviewed the allowance for this in their regulations.

Drew Kukucka withdrew the motion to approve the application, in order to resolve both the fee waiver and the commission's collective statement for approval.

The criteria for decision were discussed, including alternatives. In this case, the application is intended to resolve a public safety risk, and there is only one existing mud bog that poses this risk, to be resolved by filling it back in.

Drew Kukucka made a motion to approve a waiver of the application fee for Application 775 on the basis of resolving a public health and safety issue.

Sydney Flowers seconded. All in favor. Motion carried.

Agent Shapiro explained that the Commission can only waive the town application fee, but not the state's \$60 municipal land use application fee. Agent Shapiro collected the state fee from the applicant.

Drew Kukucka made a motion to approve **#775: 56 Egypt Road (Four-Town Fair)**. Fill in previously constructed mud bog within Upland Review Area based upon the following:

1. The Commission finds that the Applicant has submitted all necessary application materials pursuant to Section 211-7 of the Wetlands Regulations, including but not limited to, Section 211-7(E)(5) "Alternatives considered and rejected".
 2. The Commission did not find the proposed activities "significant".
 3. The Commission finds that the criteria set forth in Section 211-10B have been met by the Applicant and there is substantial evidence in the record to support this finding.
- Lise Wood seconded. All in favor. Motion carried.

III. NEW BUSINESS

1. **Modification of Application #752:** 11 Tumble Brook Circle. Construction of an in-ground pool in the Upland Review Area. Modification requested to construct retaining wall and utilize additional fill. David Springer.

Eric Peterson and Rick Zulick were in attendance to speak on behalf of the applicant. They brought the revised plans.

Agent Shapiro stated that a wetland permit for this pool was approved last year, and that engineering firm Gardner & Peterson had been engaged by the applicant, as well as Soil Scientist Rick Zulick. The project had stalled, and after it resumed, she visited the site and saw a large boulder wall and extra fill where originally was supposed to just be a sloped grass area. This now requires resolution.

Mr. Peterson described the unusual situation, and said that despite the property owner following all of the proper steps for approval, his pool contractor didn't follow the originally approved plan. He stated that they are before the commission to attempt to rectify the situation within regulations. There is now a 130' wall spanning the lawn edge, poorly constructed out of large boulders, with opportunity for soil to seep and undermine the pool and patio area. The applicant has hired a new mason to build a unilock paver wall in place of the boulder wall. He provided a brochure, and stated that construction would be simple. Mr. Peterson showed on the revised plan where the existing and proposed walls are, and that the new wall will minimize further site disturbance going forward.

Mr. Peterson stated that the alternative is to remove the wall and grade the area, but that the pool was installed higher than initially proposed, so the slope would be longer than proposed, and this would cause disturbance closer to the wetland.

Joan Formeister asked where the boulders would be going. Mr. Peterson stated that they would be taken off site.

Rick Zulick, soil scientist, stated that he did a site walk and drafted a letter dated August 10 to the commission about his findings. He read his letter into the record, which stated that he walked the site and reviewed original and revised plans, and supports the proposed corrective work and found that no substantial additional adverse impact to the abutting wetlands will occur if the following comments are incorporated prior to the start:

- 1) Hay bakes should surround the white roof leader outlet to prevent concentrated flow prior to the establishment of complete vegetative cover between the wall and the wetlands
- 2) A new, properly installed, silt fence should be installed just down-gradient of the proposed wall. (see plan)

3) All recently deposited debris should be removed by hand in the area between the proposed wall and the wetland flagged line.

Mr. Zulick and Mr. Peterson explained these comments and identified the areas on the new plan. Mr. Zulick explained that "debris" was referring largely to tree tops that were deposited within the wetland area, and that while most had been removed since his prior inspection some remains and should come out. It should be removed by hand rather than with machinery to minimize disturbance. He stated that the old silt fence and hay bales are in bad shape, and suggested that the contractors should put in new properly installed silt fence. He stated that the alternate plan is poor because it causes a significant unnecessary activity close to wetlands, and that he does not think there is a better alternative. He described the nature of the wetlands, the brook and prior wetlands, and referred to his description from the original application.

Agent Shapiro expressed that it may be useful for the applicant to retain a suitable expert to oversee this work, based on how this project has inspired, despite a prior condition regarding E&S and her specific conversations and instructions to the original pool company. Agent Shapiro also expressed concern that all debris that Mr. Zulick observed be removed appropriately.

Drew Kukucka asked which pool company was used, and Mr. Peterson responded that it was apparently Stafford Pool. Drew Kukucka asked if there were impacts of erosion that needed to be corrected at this point. Mr. Zulick and Mr. Peterson stated that at the moment there had been little erosion and no sedimentation observed, but that it would be a real concern for the future. Mr. Zulick also commented on the dense vegetation.

Drew Kukucka asked if there would be drainage for the new wall being proposed? Mr. Peterson stated that, if necessary, a drain immediately behind the wall would outlet at the ends of the wall at a significant distance from the wetland, and that very little water would drain from it.

Agent Shapiro asked Mr. Zulick about any ecological impacts that may come from the use of a wall versus a grassed slope in terms of amphibians. Mr. Zulick stated that he thought the wall was a better choice, leaving everything between the wall and the wetlands natural.

The commission discussed different conditions of approval to ensure that the homeowner is aware of the wetland proximity on the property, and that the vegetation between the wall and the wetland is not cleared, and that the existing treeline be maintained. Chair Formeister suggested allowing maintenance of a mowed strip to keep growth from the wall and fence.

Agent Shapiro provided a suggested motion to modify the original wetland permit.

Lise Wood made a motion to modify wetland permit #752, 11 Tumblebrook Circle, to construct a retaining wall with additional fill in the upland review area with the conditions that:

- 1) The applicant incorporates three enumerated comments as listed in Rick Zulick's letter dated Aug 10 2022 (see above),
- 2) The plan be modified to establish a no mow area beginning 6 feet downgradient of the wall,
- 3) The establishment of silt fence and removal of debris be supervised by a qualified professional,

This motion is based on evidence on the record this is the least impactful alternative at this point.

Daniel Fraro seconded. All in favor. Motion carried.

2. Application #776: 225 Stafford Road. Construction of new house within Upland Review Area. Martin Green.

Steve Aeschliman from Aeschliman Land Surveying was in attendance to speak on behalf of the property owner. Mr. Aeschliman explained that lot in question was part of a subdivision that was approved for building by the Conservation Commission and has expired since. The property owner wants to build a new single family home on the lot. There is a pocket of wetlands in the back. A soil scientist reflagged the wetland last week, and the wetland is currently larger than when it was previously delineated.

Mr. Aeschliman stated that the house itself was not within the Upland Review Area, and there would be around 15 feet of trench within the upland review area. There would be clearing in the upland review area to facilitate drainage at the back of the house.

Mr. Aeschliman passed around a plan that showed both the original delineation from 2002 and the new delineation.

Agent Shapiro stated that the plan seems rather straightforward and reasonable, with minimal grading and an effort to maintain as much separating distance to the wetland as is reasonable. She mentioned that the Commission may want to require permanent wetland markers as they commonly do for new development on lots containing wetlands.

Agent Shapiro stated that she received a letter from the soil scientist, Mark Friend, stating that the property contains poorly drained wetland soil, red maples and wetland shrubs. He does not expect sufficient standing water for vernal pool breeding on the property.

Agent Shapiro has not yet visited the site, but will between meetings.

3. Jurisdictional Ruling/Application #777: 520 Hall Hill Road. Construction of tobacco barn within Upland Review Area. Jarmoc Tobacco, LLC.

Agent Shapiro stated that the applicant is looking to build a seventh barn (in addition to 6 previously allowed) in the upland review area of small watercourse previously flagged.

Jay Ussery was in attendance on behalf of the applicant and stated that the barn would be placed east of the 6 previously built barns on the property. He stated that approximately 1400 square feet of the southerly end of the barn would be within the regulated area. The corner of the building would end 50-60 feet from the ditch which was delineated as a watercourse by Rick Zulick. The soil outside of the wetland is all sand and gravel.

Agent Shapiro explained that this is a jurisdictional ruling for a building directly related to the farming operation, and that there is no clearing or filling of wetlands or watercourses proposed in the application.

Drew Kukucka asked if any further clearing was needed. Mr. Ussery explained that all clearing has already occurred.

Lise Wood made a motion that the Commission finds that the activity in **Application #777:** 520 Hall Hill Road. Construction of tobacco barn within Upland Review Area. Jarmoc Tobacco, LLC. is allowed by jurisdictional ruling as a use as of right.

Sydney Flowers seconded. All in favor. Motion carried.

4. Discussion: Regulation of withdrawals of water from waterbodies.

Agent Shapiro stated that a neighbor had reported concerns about Lafayette Pond being pumped out for irrigation. The water level dropped significantly over the past few months. The State of CT regulates withdrawals of water. The neighbor reached out to DEEP, and the wetlands staff told the neighbor to contact the town. Agent Shapiro spoke to DEEP about the nuances between whether the state and/or the town is responsible for regulating specific activities.

Agent Shapiro explained that withdrawals over fifty thousand gallons per day, DEEP requires a diversion permit. DEEP shares regulation responsibility with the town on this particular issue. She stated that the commission has typically default to decision-making by DEEP, yet withdrawals can also be regulated by them. In this particular case, the withdrawals were for agricultural use, and would likely be deemed exempt. They were pumping water from an existing pond to an existing field for irrigation purposes. Also in this case, out of an abundance of caution, the farm operator will be applying to DEEP for a diversion permit.

Background information provided by the long-time leasing farm, Jarmoc Tobacco, indicated that this activity has been ongoing for many years. The drought this year made it appear more dramatic.

Agent Shapiro explained the potential issue with requiring farmers to apply for jurisdictional rulings for ongoing farming activities, and how that would be triggered for other activities. Existing farming uses are not typically required to come in for rulings. A new use or perhaps a new operator may need a jurisdictional ruling.

Other withdrawals that are not agricultural, including by pool companies, golf courses, etc, may require a permit, as DEEP's authority related to withdrawals is not exclusive, and the town may also regulate these activities. It may be a challenge to gather the expertise to regulate withdrawals, and denial would have to be based on expert testimony showing that the withdrawal would negatively impact the wetland or watercourse.

Agent Shapiro explained that she wanted to clarify whether the Conservation Commission wanted to begin regulating withdrawals or not in the future. Agricultural uses could apply for a jurisdictional ruling, but that may not be needed for ongoing agricultural use. Agent Shapiro explained that if a wetland violation occurs as a result of an activity previously deemed exempt, enforcement is still possible from the town.

The consensus of the commission is that existing agricultural withdrawals for irrigation do not need approval or jurisdictional ruling from the commission in a case like this, but a new or non-agricultural withdrawal may require a ruling or a permit.

5. Violation: 732 Hall Hill Road. Filling of a man-made pond without a permit. Hillsdale College.

Agent Shapiro stated that a resident reached out with concern that the pond was being filled in on one of the Hillsdale properties. Agent Shapiro contacted Mr. Duke, the executive director of the property, to discuss the regulations which he was not aware of. She sent a Notice of Violation for the filling of the pond, which was a man-made pond.

During their conversation, Agent Shapiro stated that she and Mr. Duke discussed the origin of the pond. She showed the commission a series of aerial photos of the property before and after the pond was made.

Mr. Duke stated that he was motivated to deal with the site due to security and safety risks. The pond has a made drop 15 feet off of a dock. It is a breeding ground for mosquitos. The high berm around the sides causes wildlife to get trapped.

It was a man made pond that was created before Hillsdale owned the property. Mr. Duke explained that despite repeated attempts and varied approaches including use of a rubber liner, it was not able to hold water without artificially pumping water into it.

Agent Shapiro estimated that the pond may have been at least 300 feet long.

The recently filled pond is more than 100 feet from known watercourses on the property, yet there is no complete delineation of the property on file.

Agent Shapiro noted that no liner was visible in the 2012 aerial, and that she had not had the ability to view the liner herself.

Agent Shapiro stated that the man made pond was dug between 2012 and 2016, likely next to a pond that was already on the property, as shown in the aerial photos from 2009 and 2012, which were shown to the commission. The original construction of the pond was done without permits and was likely a wetland violation itself. By 2016, the constructed pond was in place, and recently the berms that had been excavated to create the pond were pushed in and graded to fill the pond.

Agent Shapiro explained that it is difficult to determine the function and value of the pond now that it has already been filled. Joan Formeister clarified for the Commission that even a manmade pond is a regulated waterbody. Agent Shapiro asked the commission that since we cannot confirm what function was lost, to consider whether there should be mitigative strategies required to improve the ecological benefit of the surrounding watercourses, such as native plantings.

Agent Shapiro explained that the Notice of Violation was sent instead of requiring a permit after the fact, since that's a much cleaner way to resolve the situation. The Commission can determine whether any mitigative action is needed, or none at all.

The contractor responsible for filling in the pond, Mr. Skinner, sent a letter explaining all that had been done to create the pond and the fact that it wasn't able to hold water. He explained that previously someone had attempted to use clay and then a liner, which has since been removed.

Drew Kukucka asked if a manmade rubber lined pond that people create, would a certain size trigger it being a regulated area? Joan Formeister asked whether it becomes a pond when the liner is removed.

Drew Kukucka stated that the commission would like a more detailed letter from Mr. Skinner to the Commission with specifics about his recollection regarding the construction and his role in the construction for the record.

Joan Formeister also reminded Mr. Duke to come to the Commission in advance of any future activity.

Sydney Flowers also stated that there should be more outreach to make the public aware of the regulations, and offered to help via social media.

Mr. Duke expressed an interest in replacing large areas of lawn with meadow. Agent Shapiro stated that this could benefit water quality if areas around the ponds are targeted.

IV. AUDIENCE PARTICIPATION
NONE

V. STAFF REPORT

Agent Shapiro stated that there will be a crumbling foundation replacement at 279 Springfield St., a very wet lot. The Conservation Commission previously ruled that these replacements do not require a wetland permit. She spoke with the contractor, who stated that they would be carefully installing a silt fence. Agent Shapiro plans to visit the site to verify that it's correctly installed.

Agent Shapiro stated that there was a possible violation at 23 Cricket Rd. The pool company didn't get any permits, yet trees were cleared and the pool has already been dug out. Agent Shapiro had previously told the pool company that there may be wetlands present. At a glance, it looks like there may be wetland soils around the pool, and she has communicated to the pool company and landowner that a soil scientist may be required.

Agent Shapiro stated that she will speak with the town attorney about establishing a protocol to retain bonds from large multi-family construction projects to ensure that the work is completed correctly, which may be more appropriate than collecting individual lawn bonds.

Lise Wood made a motion to accept the staff report.
Daniel Fraro seconded. All in favor. Motion carried.

VI. CORRESPONDENCE AND BILLS

Agent Shapiro presented correspondence from Shady Lake. They filed with DEEP under the dam safety general permit to do work to repair the cap and replace stones, etc.

Agent Shapiro presented a proclamation from Governor Lamont that 2022 is the year of inland wetlands and watercourses.

Agent Shapiro presented a bill from the Journal Inquirer for \$55.09.

Agent Shapiro presented a bill from CACIWC for \$65.

Drew Kukucka made a motion to pay the presented bills.
Sydney Flowers seconded. All in favor. Motion carried.

VII. MINUTES APPROVAL: June 1, 2022

Lise Wood made a motion to approve the minutes from June 1, 2022 as written.
Sydney Flowers seconded. All in favor. Motion carries.

VIII. ADJOURNMENT

Daniel Fraro made a motion to adjourn at 10:00 P.M.
Sydney Flowers seconded. All in favor. Motion carried.

Respectfully Submitted,
Tara Comrie, Recording Secretary

MINUTES ARE NOT OFFICIAL UNTIL APPROVED AT A SUBSEQUENT MEETING